Supreme Court, U.S.
FILED
95 1248 JAN 31 1996
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SAMANTHA NEELY, by and through her parents, MR. AND MRS. GEORGE NEELY,

Petitioner,

-against-

RUTHERFORD COUNTY SCHOOLS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Gary Buchanan
Tennessee Protection and Advocacy, Inc.
Suite 100
2416 21st Ave. S.
Nashville, TN 37212
(615) 298-1080
Attorney for Petitioner
Counsel of Record

January 31, 1996

QUESTION PRESENTED

WHETHER TRACHEOSTOMY MAINTENANCE REQUIRING THE ASSIGNMENT OF A LICENSED PRACTICAL NURSE TO A SINGLE CHILD IS A SCHOOL HEALTH SERVICE UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT OR A MEDICAL SERVICE WHICH SCHOOLS ARE NOT REQUIRED TO PROVIDE?

PARTIES TO THE PROCEEDING

All the parties are listed in the caption.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CASES	iii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	17

TABLE OF AUTHORITIES

CASES:

Bevin v. Wright,
666 F.Supp 71 (W.D. Penn. 1987)
Pages 11, 12.

Detsel v. Board of Education of Auburn,
637 F. SUPP. 1022 (N.D. N.Y., 1986),
aff'd, 820 F.2d 587 (2d Cir. 1987),
cert denied, 484 U.S. 981 (1987)
Pages 11, 13.

Granite School District v. Shannon M.,
787 F.Supp. 1020 (D. Utah, 1992)
Pages 11, 12.

Irving Independent School District v. Tatro,
486 U.S. 883 (1984)
Passim.

Polk v. Central Susquehanna School District,
853 F.2d 171 (3d Cir. 1988)
Page 16.

Sacramento City Unified School District v. Holland,
14 F.3d 1398 (9th Cir. 1994)
Page 16.

STATUTES:

20 U.S.C. Section 1400(c) Page 10.

20 U.S.C. Section 1401(a)(17)
Page 2, 10.

20 U.S.C. Section 1401(a)(20)
Page 5.

20 U.S.C. Section 1412(5)(B)
Pages 3, 8, 9, 16.

20 U.S.C. Section 1415(b)(2)
Page 7.

20 U.S.C. Section 1415(e)(4)
Page 8.

REGULATIONS:

34 C.F.R. Section 300.13(a)
Pages 3, 10.

34 C.F.R. Section 300.7(b)(8)
Page 5.

34 C.F.R. Section 300.13(b)(4)
Pages 3, 11.

34 C.F.R. Section 300.13(b)(11)
Pages 4, 7, 10, 11.

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SAMANTHA NEELY, by and through her parents, MR. AND MRS. GEORGE NEELY,

Petitioner,

-against-

RUTHERFORD COUNTY SCHOOLS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Gary Buchanan
Tennessee Protection and Advocacy, Inc.
Suite 100
2416 21st Ave. S.
Nashville, TN 37212
(615) 298-1080
Attorney for Petitioner
Counsel of Record

January 31, 1996

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is reported at 68 F.3d 965 (6th Cir. 1995) and reprinted in the Appendix to this Petition. The opinion of the District Court for the Middle District of Tennessee is reported at 851 F.Supp. 888 (M.D. Tenn., 1994) and also reprinted in the Appendix. The opinion of the administrative law judge is not reported and is also set forth in the appendix.

JURISDICTION

The final judgment of the Court of Appeals for the Sixth Circuit was entered on November 2, 1995. Petitioner invokes this Court's jurisdiction under 28 U.S.C. Section 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

20 U.S.C. Section 1401(a)(17). The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. Section 1412(5) The state has established . . .

(B) procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. Section 300.13(a). As used in this part, the term "related services" means transportation, and such developmental, corrective, and other supportive services as required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling training.

34 C.F.R. Section 300.13(b)(4). "Medical services" means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

34 C.F.R. Section 300.13(b)(11). "School health services" means services provided by a qualified school nurse or other qualified person.

STATEMENT OF THE CASE

Samantha Neely was born on September 28, 1986, with a medical condition which prevents her from breathing normally.

Samantha has an extremely rare condition known as Congenital Central Hypoventilation Syndrome. This condition involves a dysfunction of the brain's regulation of breathing. Individuals with this disorder have breathing which is too shallow to get air into the entire lung. This results in hypoxemia (low oxygen in the blood), hypercapnia (high carbon dioxide in the blood) and acidosis (acidity in the blood).

In Samantha's particular case, she does not breathe at all when she is sleeping and she would not breathe if she were unconscious for some other reason. Significantly, Samantha can lose consciousness as a result of hypoxemia and hypercapnia. In other words, she cannot breathe if she is not awake, but even when she is awake, her condition involves a heightened risk of loss of consciousness.

A tracheostomy was performed shortly after birth, and Samantha breathes through a hole in her throat, called a stoma. A device known as a tracheostomy tube is inserted into the stoma to permit Samantha to breathe.

As previously stated, Samantha cannot breathe on her own if she is sleeping. Therefore, she is attached to a ventilator at night. During the day, she breathes on her own without the assistance of a ventilator.

In order to attend school, Samantha requires respiratory care. The care involves periodic suctioning of the child's tracheostomy with a mechanical device which removes the normal secretions from the throat. Samantha must be watched more closely than other children to make sure she doesn't fall asleep. Finally, Samantha can stop breathing because of loss of consciousness or a blockage of her tracheostomy tube. In such an event, breathing must be restored rapidly to prevent serious injury or even death.

Samantha has no other serious health problems and she has a normal life expectancy. Respiratory care of an adult is much less complex because, among other things, the airways are much larger. Eventually, Samantha will be able to provide her own tracheostomy care.

Samantha entered school at the start of the 1992-93 school year. She was classified as a disabled child under the category other health impaired as defined at 34 C.F.R. Section 300.7(b)(8).

There is no school nurse at any school in Rutherford County. For that reason, during the 1992-93 school year, Mr. or Mrs. Neely attended school with Samantha every day to perform any necessary suctioning and to be available in the event of an emergency.

Mr. and Mrs. Neely notified the school that they would not be able to attend school every day with Samantha during the next school year, 1993 - 94, because of their need to care for two other children with serious health problems. Therefore, they asked the school to make appropriate arrangements for addressing Samantha's respiratory care for the 1993 - 94 school year.

Under the Individuals With Disabilities Education Act, disabled children are entitled to an Individualized Education Program (hereinafter, IEP) as defined at 20 U.S.C. Section 1401(a)(20). Samantha's IEP for the 1993-94 school year was drafted in a meeting on May 7, 1993. Samantha's IEP includes the following: "Every effort will be made to insure that an educational assistant be hired with at least LPN training." LPN is an abbreviation for licensed practical nurse.

According to Rutherford County's job description for special education assistants, tracheostomy maintenance is part of the educational assistant's job. By asking that a licensed practical nurse be hired in this role, the parents were asking that the service be provided by someone legally qualified to do so.

Mr. and Mrs. Neely checked with the school system several times during the summer of 1993 about the hiring of the educational assistant. Near the end of the summer they were told that the school system had located an appropriate person for the job. They assumed that this meant someone who was a licensed practical nurse.

When Samantha was taken to school by her parents at the start of the 1993 - 94 school year, her parents discovered that the individual hired by the school system was not an L.P.N. and was otherwise inappropriately trained to address Samantha's respiratory needs.

A meeting on August 30, 1993, did not resolve the problem. The school system contended that it had tried but failed to hire an L.P.N. for the position. The

school system also stated that it was not legally required to hire an L.P.N. for the position.

Because the child's safety was at issue, Mr. and Mrs. Neely requested an administrative hearing under 20 U.S.C. Section 1415(b)(2) and accepted homebound services as an interim placement. The child has remained on homebound services since that time.

The administrative hearing took place before the Tennessee Department of Education on October 28, 1993, and a final order was issued on November 30, 1993. The issue in the case was whether the provision of an L.P.N. to Samantha was a related service necessary to assist Samantha in benefiting from special education, as defined by 34 C.F.R. Section 300.13, or a medical service which the school system was not required to provide. Medical services, except for the purpose of diagnosis and evaluation, are specifically excluded from the list of related services by 34 C.F.R. Section 300.13(a).

The parents argued that the service of the licensed practical nurse in this case was a related service, specifically, a school health service as set forth at 34 C.F.R. Section 300.13(a) and defined at 34 C.F.R. Section 300.13(b)(11). The parents argued that the issue was controlled by Irving Independent School District v. Tatro, 486 U.S. 883 (1984). The parents argued that Tatro limited the medical services exclusion to services which must be provided by a licensed physician. Acknowledging a line of post-Tatro cases holding that unduly burdensome nursing services could be subject to the medical exclusion, the parents also argued that while Samantha required a licensed practical nurse to be constantly available in the event of an emergency, she did not actually require constant one-to-

(B) procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. Section 300.13(a). As used in this part, the term "related services" means transportation, and such developmental, corrective, and other supportive services as required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling training.

34 C.F.R. Section 300.13(b)(4). "Medical services" means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

34 C.F.R. Section 300.13(b)(11). "School health services" means services provided by a qualified

The school system appealed the District Court's decision to the Court of Appeals for the Sixth Circuit. In an opinion and order entered on November 2, 1995, reported at 68 F.3d 965 (6th Cir. 1995), the Sixth Circuit reversed the decision of the District Court.

The parents supported the District Court's decision with the same arguments made before the Administrative Law Judge and the District Court. The Sixth Circuit rejected the argument of the parents that this Court's decision in Tatro limited the medical exclusion to services that must be performed by a physician for purposes other than diagnosis and evaluation. The Sixth Circuit agreed with the District Court's conclusion that Samantha required constant care. Likewise, the Sixth Circuit agreed with the District Court that Tatro allowed other services to be deemed excluded medical services if the services were unduly burdensome.

The Sixth Circuit disagreed with the District Court's finding that the services required for Samantha were not unduly burdensome. The Sixth Circuit said that private duty, one-to-one care of the type required by Samantha is inherently burdensome and thus an excluded medical service. The District Court erred in balancing the cost to the school against the gains to the child. Significantly, the Sixth Circuit did not discuss the child's rights under 20 U.S.C. Section 1412(5)(B).

For purposes of this Petition, the parents accept the findings of the District Court and the Court of Appeals that Samantha requires constant nursing care while in school. Thus, the arguments advanced in support of granting the writ are all based on the assumption that Samantha does in fact require one-to-one or private duty nursing care when she is in school.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SIXTH CIRCUIT IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN IRVING INDEPENDENT SCHOOL DISTRICT V. TATRO, 468 U.S. 883 (1984).

In Irving Independent School District v. Tatro, 486 U.S. 883 (1984), the Court granted certiorari to determine whether the Education of the Handicapped Act (now the Individuals With Disabilities Education Act) required a school district to provide a handicapped child with clean intermittent catheterization.

Resolution of this question involved the construction of several provisions of the Act and the implementing regulations issued by the Department of Education.

The Act provides that children with disabilities are entitled to special education and related services to meet their unique needs. 20 U.S.C. Section 1400(c). Related services are services that may be required to assist a child with a disability to benefit from special education. 20 U.S.C. Section 1401(a)(17). Related services do not include medical services except for the purpose of diagnosis or evaluation. Id.

Additional guidance is provided by the implementing regulations. Under the regulations, the definition of related services also includes school health services. 34 C.F.R. Section 300.13(a). School health services are defined as follows: "services provided by a qualified school nurse or other qualified person." 34 C.F.R. Section 300.13(b)(11). Medical services are

defined by the regulations as "services provided by a licensed physician" for purposes of diagnosis and evaluation. 34 C.F.R. Section 300.13(b)(4).

In Tatro, the Court said that the regulations of the U.S. Department of Education, set forth above, were entitled to deference. The Court said that under the Department's definition of medical services, 34 C.F.R. Section 300.13(b)(4), the medical services not owed under the Act were services by a licensed physician, except for diagnosis and evaluation. 468 U.S. at 892, f.n. 10. Since CIC was a simple procedure that could be performed by a layperson with minimal training, it did not require the presence of a licensed physician, and was therefore not an excluded medical service. The Court ruled that CIC was a school health service as defined at 34 C.F.R. Section 300.13(b)(11).

Tatro clearly and unequivocally holds that the medical services exclusion is limited to services performed by a physician. 468 U.S. at 894.

In this case, the Sixth Circuit failed to follow this clear and unequivocal holding, and ruled that the services of a licensed practical nurse were within the medical exclusion, thus denying Samantha Neely the opportunity to attend school.

In so ruling, the Sixth Circuit followed a line of cases, which hold that the Court's ruling in Tatro was limited to the specific facts of that case. See, Granite School District v. Shannon M., 787 F. Supp. 1020 (D. Utah, 1992); Detsel v. Board of Education of Auburn, 637 F. Supp. 1022 (N.D. N.Y., 1986), aff'd, 820 F.2d. 587 (2d Cir. 1987), cert denied, 484 U.S. 981 (1987); Bevin v. Wright, 666 F.Supp 71 (W.D. Penn. 1987). In

the opinion, the Sixth Circuit agreed with the following statements from these cases:

1. Tatro does not stand for the proposition that all health services performed by someone other than a licensed physician are related services under the Act regardless of the amount of care, expense, or burden on the school system and, ultimately, on other school children. Rather, Tatro holds only that services which must be provided by a licensed physician, other than those which are diagnostic or evaluative, are excluded and that school nursing services of a simple nature are not excluded. Shannon M. at 787 F. Supp. 1027.

2. Shannon's reliance on Tatro is misplaced. The differences between the level of care required in Tatro and the care required by Shannon are significant. The child in Tatro did not require constant monitoring. The CIC procedure, which the child would soon be able to perform herself, could be performed by a layperson a few times a day. In contrast, Shannon requires constant care to monitor and clear her tube. Shannon M. at 787 F. Supp. 1030.

3. It is the private duty aspect of Bevin's nursing services which distinguishes this case from Tatro which involved intermittent care which could be provided by the school district at relatively little expense in both time and money. Wright, at 666 F. Supp. 75.

4. The Supreme Court considered the extent and nature of the services performed in the Tatro decision. Unlike CIC, the services required by Melissa are extensive. This is not a simple procedure which the child may perform herself. Constant monitoring is required in order to protect Melissa's very life. The record indicates that the medical attention required by

Melissa is beyond the competence of a school nurse. Detsel, 637 F. Supp. at 1026 - 27.

In addition, the Sixth Circuit contributed two new developments to this line of cases. First, the Sixth Circuit held that it is appropriate to take into account the risk involved and the liability factor of the school district inherent in providing a service of a medical nature. 68 F.3d at 971. Second, the Court held that constant nursing care was inherently burdensome, and therefore an excluded medical service, without regard to the cost of the care.

The Sixth Circuit's decision, and the cases upon which it relied, are in direct conflict with Tatro. There is nothing in Tatro that can be fairly read to limit the decision to the facts of that case. There is nothing in Tatro which says the amount, expense, or burden of the care is relevant. There is nothing in Tatro which limits school health services to school nursing services of a simple nature. There is nothing in Tatro which limits school health services to intermittent care which the school district can provide at relatively little expense in both time and money. There is nothing in Tatro which excludes constant or private duty nursing care from the definition of school health services or places such services within the medical exclusion.

In Tatro, the Court discussed expense and burden in two different contexts, neither of which supports the Sixth Circuit or the cases upon which it relies. First, the Court speculated that Congress and the Department of Education might have excluded medical services from the array of related services on the basis of expense. At 468 U.S. at 892-893. There is nothing in this discussion to support the argument that cost or burden is a factor to be considered in distinguishing

between excluded medical services and school health services. In fact, the Court's discussion on this point refutes the argument, since it suggests that cost and burden were probably taken into consideration when the statute and regulations were drafted.

Second, the Court said that the simple care in this case, which could be provided by a nurse or a trained layman, was similar in nature to care routinely provided by school nurses to non-disabled children and that it would be strange indeed if the Act failed to secure for children with disabilities services routinely provided to non-disabled children. 468 U.S. at 893 - 894. Again, this discussion does not support the Sixth Circuit's reading of Tatro, it refutes that reading. The discussion of the nature of the services in Tatro was intended to point out the similarity of the requested services to services routinely provided to non-disabled students. It was not intended to limit the definition of school health services or expand the definition of excluded medical services.

The parameters of the Court's ruling in Tatro are set forth in a three part test to be used in determining whether a particular service is a school health service. 468 U.S. at 894. If school health services were intended to be limited by the cost, risk, or private duty nature of the services, the Court could have easily built these limitations into the test. The Court did not do so.

Finally, the Sixth Circuit's belief that liability factors could be considered in distinguishing between excluded medical services and school health services is in direct conflict with this Court's statement in Tatro that liability and risk were not relevant in determining the right of children with disabilities to attend public schools. 468 U.S. at 893, f.n. 12.

II. THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, AFFECTING NOT ONLY THE RIGHTS OF CHILDREN WITH DISABILITIES WHO NEED SCHOOL HEALTH SERVICES, BUT ALL CHILDREN WHO NEED RELATED SERVICES TO BENEFIT FROM SPECIAL EDUCATION.

The decision of the Sixth Circuit in this case and other cases in conflict with the holding in Tatro, represent an erroneous line of authority threatening the educational rights of thousands of children with disabilities. This Court must review this decision to prevent the irreparable damage that will result when school systems rely on this line of cases to determine their responsibility to provide school health services and other related services.

The Sixth Circuit's decision and this line of cases needlessly exclude children who require school health services from public school and forces these children into homebound settings, to their detriment. Although the facts of the cases generally involve children with need for extensive school health services, the holdings of the cases are much broader. The cases define the medical exclusion so broadly and school health services so narrowly that children with disabilities are entitled to little more in the way of school health services than children who are not disabled. By limiting school health services to the type of services involved in Tatro, these cases limit school health services to services this Court

said were available to all students, disabled and non-disabled alike. 468 U.S. at 893 - 894. In Tatro, the Court said that such a result would be strange indeed, yet that is the result of these cases.

Further, the Sixth Circuit's decision and this line of cases irrationally discriminates against children who require school health services to attend school. Under this line of cases, the child's right to attend school with students who are not disabled is extinguished if the child requires much more than the school health services provided to non-disabled students. These cases erect a barrier to children who require health services that is not applied to children who need other types of related services. No other related service is defined by reference to cost or limited by reference to services provided to children who are not disabled. Many children, especially severely disabled children, have IEP's which consist almost entirely of related services such as physical, occupational, or speech therapy. Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988), cert. denied., 484 U.S. 1030 (1989).

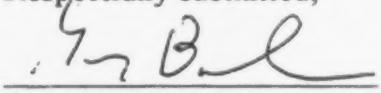
The Sixth Circuit's decision and the line of cases upon which it is based also discriminates against children who require school health services by determining their right of access to an integrated education on the basis of cost alone. These children, like other children under the Act, should have their right to an education in the least restrictive environment determined by proper application of 20 U.S.C. Section 1412(5)(B). Other circuits apply a four part test to decide access issues under this provision, in which cost is just one factor to be considered. See, e.g., Sacremento City Unified School District v. Holland, 14 F.3d 1398 (9th Cir. 1994).

Finally, there is nothing in this line of cases to prevent the extension of this analysis to other related services like those mentioned in Polk. The Sixth Circuit's expansive interpretation is a cause for great concern. Most related services could be deemed excluded medical services just as easily as care by a nurse . Thus, school systems could arbitrarily limit the provision of other related services by contending that "burdensome and expensive" levels of related services were excluded medical care. All children with disabilities who receive related services are placed in jeopardy by the unrestrained development of this erroneous line of authority.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,



Gary Buchanan
Tennessee Protection and
Advocacy, Inc.
Suite 100
2416 21st Ave. S.
Nashville, TN 37212
(615) 298-1080
Attorney for Petitioner
Counsel of Record

January 31, 1996

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SAMANTHA NEELY, by and through her parents, MR. AND MRS. GEORGE NEELY,

Petitioner,

-against-

RUTHERFORD COUNTY SCHOOLS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX

Gary Buchanan
Tennessee Protection and Advocacy, Inc.
Suite 100
2416 21st Ave. S.
Nashville, TN 37212
(615) 298-1080
Attorney for Petitioner
Counsel of Record

January 31, 1996

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1995 FED App. 0323P (6th Cir.)
File Name: 95a0323p.06

No. 94-5755

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMANTHA NEELY, GEORGE NEELY, CAROL NEELY,
Plaintiffs-Appellees,

v.

RUTHERFORD COUNTY SCHOOL,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Middle District of Tennessee

---

Decided and Filed November 2, 1995

Before: WELLFORD, MILBURN, and SUHRHEINRICH, Circuit Judges.

HARRY W. WELLFORD, Circuit Judge. We are called upon here to interpret the scope of the "medical services" exclusion to the Individuals with Disabilities Education Act

("IDEA"), 20 U.S.C. § 1401(17).[1] Plaintiff Samantha Neely is a seven year old child who attends school in Rutherford County. Samantha suffers from a medical condition which required that she receive a tracheostomy. As a result of her condition, Samantha must undergo regular suction of throat, nose, and mouth areas in order to avoid serious and, even life threatening, health consequences. George and Carol Neely, Samantha's parents, believe that the IDEA obligates Rutherford County to provide Samantha with suctioning services while she is in school and that Tennessee law requires that those services be provided by a licensed medical professional. The district court agreed with plaintiffs and rejected Rutherford County's contention that such services were "medical services" that Congress specifically excluded under the IDEA. For the reasons stated below, we **REVERSE** the decision of the district court.

I. *STATEMENT OF FACTS*

There is little dispute concerning many of the facts of this controversy. Samantha Neely suffers from Congenital Central Hypoventilation Syndrome, an extremely rare condition that causes breathing difficulties. Samantha's tracheostomy procedure was necessary to assist her breathing. The procedure creates an opening in the throat, known as a stoma, through which a breathing tube is inserted. This tube must remain in place at all times, but the tube can be dislodged relatively easily if Samantha coughs or evens adjusts her clothing. Should the tube become dislodged, Samantha's respiratory functions will

---

[1]The IDEA amended the "Education for the Handicapped Act" which Congress originally enacted in 1975. Pub. L. No. 101-476, § 901(a)(1),(3), 104 Stat. 1103, 1141-42 (1990). The IDEA did not amend, however, the substantive provisions which are at issue in this appeal.

cease or become shallow, she will lose consciousness, and she will die if full breathing is not quickly restored.[2]

As a result of the tracheostomy, Samantha is unable to expel throat, mouth, and nose secretions. Consequently, she must regularly suction her breathing passage by mechanical device to ensure that the secretions do not create a blockage; such a blockage would lead to death if not quickly cleared. The number of times Samantha must be suctioned each day varies with the season and with Samantha's health. For instance, when Samantha has a cold, she must be suctioned approximately every twenty minutes; when Samantha is in good health, she may need to be suctioned only after meals.

If Samantha's breathing stops, she may require ventilation with an AMBU bag, which is a device that artificially pumps air into the lungs. If care is not administered within a very few minutes, serious brain damage or death will occur. Samantha is unable to provide her own tracheostomy care. A well-trained individual is required because insertion of the breathing tube can be difficult. The suctioning process must be carefully performed to avoid injury to Samantha and there is little margin for error when resuscitation methods are required. Given the short response time available in emergency situations, the care giver must have sufficient training to avoid panic. Samantha's attendant must devote considerable amounts of his or her attention to Samantha and must be readily accessible to her.

During her first year of school, Samantha's parents alternately attended school with Samantha to provide the care she needs. Due to the illness of another child, however, the Neelys petitioned the school district to hire a full-time nurse or respiratory care professional to attend to Samantha during the coming school year. Rutherford

---

[2]Samantha is attached to a mechanical ventilator when she is sleeping because Samantha cannot breathe on her own when she is unconscious.

County initially agreed to employ an attendant with the requisite training and revised Samantha's individualized educational plan ("IEP")[3] accordingly. The school district, however, subsequently hired an individual with only a nursing assistant's certification. The Neelys objected and removed Samantha from school when the care requested was not promptly provided. After a meeting with school officials to determine why it had not hired a respiratory care professional, the parties agreed that Samantha would receive home instruction until the Education Department could determine whether Rutherford County had to hire a nurse to provide in-school, full-time care for Samantha.

Samantha's parents requested a due process hearing before the Tennessee Department of Education. On October 28, 1993, an administrative law judge (ALJ) held a hearing at which the parties submitted testimonial and documentary evidence. The ALJ concluded that the care requested by Samantha was a "medical service" which Rutherford County was not obligated to provide under the IDEA. After the Education Department entered its final order, Samantha and her parents filed suit in federal district court seeking judicial review. The district court held a hearing and provided both parties the opportunity to offer evidence. Neither party submitted any evidence at the hearing, but the Neelys submitted the full administrative record to the district court and supplemented the record with the affidavit of George Neely, Samantha's father. After a review of the evidence, the district court found that the services requested by Samantha were supportive services that the IDEA required Rutherford County to provide. In addition, the district court found that these services were not medical services excluded under the Act.

---

[3]An IEP is a written program for each handicapped student which is drafted after a meeting between local school officials and parents. 20 U.S.C. § 1401(19). The purpose of the IEP is to provide an evaluation of the child's needs and to set objective criteria for the school to follow during an academic year. *Id.* Each child's IEP is revised on an annual basis. *Id.* § 1401(18)(E).

The district court therefore reversed the ALJ's decision and ordered the school district to provide the requested care. Rutherford County filed this timely appeal.

II. *STANDARD OF REVIEW*

Section 1415(e)(2) of the IDEA provides that "[i]n any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines appropriate." 20 U.S.C. § 1415(e)(2). A preponderance finding is indicated in an IDEA action, *Doe ex rel. Doe v. Defendant 1*, 898 F.2d 1186, 1190 (6th Cir. 1990), and the Supreme Court has rejected unrestricted *de novo* review. In *Board of Education of the Hendrick Hudson Central School District v. Rowley ex rel. Rowley*, 458 U.S. 176, 206 (1982), the Court stated that the

> the provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. *The fact that § 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings.* And we find nothing in the Act to suggest that merely because Congress was sketchy in establishing substantive requirements, as opposed to procedural requirements for the preparation of an IEP, it intended that the reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself.

Id. (emphasis added). In light of *Rowley*, we have interpreted § 1415(e)(2) as calling for "a modified *de novo*

review." *E.g.*, *Doe ex rel. Doe v. Board of Educ. of Tullahoma City Schs.*, 9 F.3d 455, 458 (6th Cir. 1993); *Thomas ex rel. Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 624 (6th Cir. 1990). This modified standard "requires a *de novo* review but the district court should give due weight to the state administrative proceedings in reaching its decision." *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1062 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983). We, therefore, give the ALJ's decision appropriate consideration.

III. *THE REQUIREMENTS OF THE IDEA*

Congress enacted the IDEA as remedial legislation in order to enhance the educational opportunities of handicapped children. *Thomas ex rel. Thomas*, 918 F.2d at 619. The Act's overall objective is to guarantee handicapped children a substantive right to a "free appropriate public education." 20 U.S.C. § 1412(1). The IDEA defines the phrase, free appropriate public education (FAPE), as "special education and related services" that are provided at public expense and supervision, that meet state educational standards, and that conform with the IEP developed for each child. *Id.* § 1401(18). Section 1401(16) defines "special education" as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including--(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education." *Id.* § 1401(16)(A),(B). Section 1401(17) states that "related services" include

> transportation, and such developmental, corrective, and *other supportive services* (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counselling, and *medical services, except that such medical services shall be for diagnostic and evaluation purposes only)* as may be

> required to assist a child with a disability to benefit from special education.

Id. § 1401(17) (emphasis added).

The issue in the case at bar is whether the care requested by Samantha is a "related service" under the IDEA. If the requested care is a related service, the IDEA obligates Rutherford County to provide the service free of charge.

In deciding whether a service is a "related service" under § 1401(17), we must first answer two subsidiary questions. *See Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 890 (1984). We must initially determine whether the requested service is a "'supportive service[] . . . required to assist a child with a disability to benefit from special education.'" *Id.* (quoting 20 U.S.C. § 1401(17)). If not, then the IDEA imposes no obligation on the school system to provide the service. *Id.* at 894 (explaining that if requested service can be performed at some time other than during the school day than it is not a service "necessary to aid a handicapped child to benefit from special education"). If the requested service is a supportive service, then we must also decide whether the service is a "medical service" which is excluded from the requirements of § 1401(17). *Id.* at 890.

Rutherford County concedes that the cleaning of Samantha's tracheostomy is a supportive service that is necessary to enable the child to enjoy the benefit of special education. It argues, however, that the requested care is a medical service performed for other than diagnostic and evaluative purposes. The district court acknowledged that "the care requested is clearly medical in nature," but it held that, "[a]bsent evidence that the care requested would be unduly burdensome to the school district, the nursing care *will be deemed* a related, supportive service that falls outside the medical services exclusion."

By its own terms, § 1401(17) would seem to indicate that a school district pay for only those medical services which are performed for diagnostic and evaluation purposes. Thus, one might assume that a school district is not

required under the Act to provide a medical service that is performed for any other purpose.[4] In *Tatro*, however, the Supreme Court did not focus on the purpose for which the service is performed but determined that the application of the medical services exclusion depends on who provides the service and the burdens associated therewith. *Tatro*, 468 U.S. at 892-94.

Tatro involved an eight year old girl who was born with spina bifida, a congenital birth defect. *Id.* at 885. The birth defect caused a neurogenic bladder which prevented her from urinating voluntarily. *Id.* As a result, the child had to undergo intermittent catheterizations every three or four hours.[5] *Id.* When the child's school district refused to hire personnel to perform the catheterizations, her parents filed suit, alleging that the requested service was a related service which the school district was obligated to provide. *Id.* at 886. The Supreme Court found that the catheterization service was a support service which enabled the child to enjoy the benefits of special education. *Id.* at 891. The Court then turned its attention to whether the requested service was a medical service excluded under the Act. *Id.* In finding that the catheterization was *not* a medical service, the Court relied heavily on regulations issued by the Department of Education which included "school health services" within the definition of related services. *Id.* at 892 (quoting 34 C.F.R. § 300.13(a)). "School health services" were defined, in turn, as "'services provided by a qualified school nurse or other qualified person.'" *Id.* (quoting 34 C.F.R.

---

[4]The Neelys do not contend that the care requested in this case is for diagnostic or evaluation purposes.

[5]The catheterization procedure required the insertion of a tube into the child's urethra so that urine could be drained from her bladder. *Tatro*, 468 U.S. at 885. The Court characterized the procedure as a "simple one that may be performed in a few minutes by a layperson with less than an hour's training." *Id.* The Court even added that the child would soon be able to perform the procedure herself. *Id.*

§ 300.13(b)(10)). The Court also noted that the Secretary of Education defined the term "medical services" as those "'services provided by a licensed physician.'" *Id.* (quoting 34 C.F.R. § 300.13(b)(4)).

The Court concluded that, when read together, these regulations required the school to provide services which could readily be performed by a school nurse while services performed by a physician were excluded. *Id.* The Court found that the Secretary's interpretation of the statutory language warranted deference, because it was reasonable to believe that Congress included the medical services exception in order to "spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence." *Id.* In such a case, *Tatro* pointed out, "[c]hildren with serious medical needs are still entitled to an education . . . [since] the Act specifically includes instruction in hospitals and at home within the definition of 'special education.'" *Id.* at 892 n.11 (citing 20 U.S.C. § 1401(16)). Because the catheterization could be provided by a school nurse or trained layman, however, the Court held that is was reasonable for the Secretary to conclude "that school nursing services are not the sort of burden that Congress intended to exclude as a 'medical service.'" *Id.* at 893.

Tatro is subject to several interpretations. It may be read as adopting a bright line rule that any medical service that can be performed by someone other than a licensed physician falls outside the scope of the exception and must be provided by the school. *See, e.g., Macomb County Intermediate Sch. Dist. v. Joshua S.*, 715 F. Supp. 824, 828 (E.D. Mich. 1989). The majority of courts, however, have rejected such a *per se* rule. *See, e.g., Granite Sch. Dist. v. Shannon*, 787 F. Supp. 1020, 1027 (D. Utah 1992); *Bevin H. ex rel. Michael H. v. Wright*, 666 F. Supp. 71, 75 (W.D. Pa. 1987); *Detsel ex rel. Detsel v. Board of Educ. of Auburn Enlarged City Sch. Dist.*, 637 F. Supp. 1022, 1026-27 (N.D.N.Y. 1986). In *Shannon*, the

United States District Court for the District of Utah stated that it did not

> read *Tatro* to stand for the proposition that *all* health services performed by someone other than a licensed physician are related services under the Act regardless of the amount of care, expense, or burden on the school system and, ultimately, on other school children.
>
> . . . .
>
> . . . Rather, the Court held only that services which *must* be provided by a licensed physician, other than those which are diagnostic or evaluative, *are* excluded and that school nursing services of a simple nature are not excluded.

Shannon, 787 F. Supp. at 1027 (emphasis added). In the instant case, the district court found this rationale persuasive and refused to follow a *per se* rule. Instead, the court concluded that *Tatro* required it to measure the burden on the school district to provide the requested care and to require the school to provide the service if the burden was not excessive.

Rutherford County argues that the district court misapplied the *Tatro* rationale by engaging in a balancing of interests analysis *after* it had already determined that the requested care was a medical service. Defendant maintains that the only relevant inquiry is whether the service is medical in nature and, if that question is answered in the affirmative, it is inappropriate for a court to employ any further cost-benefit analysis.

The district court found the service in question to be "medical in nature." We believe the better interpretation of *Tatro* to be that a school district is not required to provide every service which is "medical in nature." The services at issue in *Tatro* could be provided by someone other than a nurse and a layperson, with minimum training, could provide it. *Tatro*, 468 U.S. at 894. It was,

therefore, the kind of service that was not unduly expensive or beyond the range of the school system's competence. *Id.* at 892. We believe it is appropriate to take into account the risk involved and the liability factor of the school district inherent in providing a service of a medical nature such as is involved in this controversy.

IV. *THE BURDEN OF PROVIDING THE REQUESTED SERVICE*

Both parties agree that Tennessee law requires that the service requested by Samantha be administered by a physician, registered practical nurse, licensed practical nurse, respiratory care specialist, the patient's relatives or the patient herself. TENN. CODE. ANN. §§ 63-6-402, 63-6-410. Thus, the parties also agree that, unlike *Tatro*, Tennessee law would not allow a school nurse to administer the service in question unless the nurse or medical person possessed the requisite licensing and training. The district court estimated that the cost of hiring a licensed practical nurse was not much more than the cost of hiring a certified nurse's assistant. Thus, the district court found that the burden of providing the requested care was not excessive since Rutherford County had initially agreed to hire such an assistant, including upgrading such assistant to the requisite qualification level.

Rutherford County contends that the district court's finding is clearly erroneous. It notes that both the ALJ and the district court found that Samantha required almost constant care. A nurse or medical attendant would have had to devote virtually all of his or her attention to Samantha. Rutherford County contends that it is inherently burdensome to hire one medical professional to care for a single child, since the cost cannot be reasonably or feasibly distributed over the entire student population. Since Rutherford County originally intended for the nursing assistant in question to assist many different children, defendant maintains that the district court mistakenly assumed that the added cost of providing Samantha the requested care was insubstantial.

Since we agree that the services requested by Samantha are inherently burdensome, we express no opinion about the financial cost of hiring a licensed practical nurse rather than a nursing assistant. The undue burden in this case derives from the nature of the care involved rather than the salary of the person performing it. We are not persuaded by *Department of Education v. Katherine D. ex rel. Kevin & Roberta D.*, 727 F.2d 809, 815 (9th Cir. 1983), a case decided before *Tatro*. The Ninth Circuit held that the Act required a school district to pay for a handicap child's tracheostomy services, since a trained layperson or school nurse was capable of administering the care. *Id.* at 815 n.6. In several decisions since *Tatro*, however, district courts have held that the Act does not require a school district to provide tracheostomy services, among others, when the handicapped student requires virtually constant care. *E.g.*, *Shannon*, 787 F. Supp. at 1030; *Wright*, 666 F. Supp. at 75; *Detsel ex rel. Detsel*, 637 F. Supp. at 1026-27. In *Shannon*, the district court explained:

> Shannon's reliance on *Tatro* is misplaced. The differences between the level of care required in *Tatro* and the care required by Shannon are significant. The child in *Tatro* did not require constant monitoring. The CIC procedure, which the child would soon be able to perform herself, could be performed by a layperson a few times a day. In contrast, Shannon requires constant care to monitor and clear her tube. The parties have stipulated that the care of at least a licensed practical nurse is required.

Shannon, 787 F. Supp. at 1030. In *Wright*, the district court explained that

> [t]he services required are varied and intensive. They must be provided by a nurse, not a layperson. They are time-consuming and expensive. Above all, the life threatening prospect of a mucous plug demands the constant attention of the nurse. Because of this need for constant vigilance, a school nurse or any other

> qualified person with responsibility for other children within the school could not safely care for Bevin.
>
> It is the "private duty" aspect of Bevin's nursing services which distinguishes this case from . . . . *Tatro* . . . and *Katherine D.* [which] all involved intermittent care which could be provided by the school district at relatively little expense in both time and money.

Wright, 666 F. Supp. at 75. Similarly, the district court in *Detsel* noted that

> [t]he Supreme Court considered the extent and the nature of the service performed in the *Tatro* decision. Unlike CIC, the services required by Melissa are extensive. This is not a simple procedure which the child may perform herself. Constant monitoring is required in order to protect Melissa's very life. The record indicates that the medical attention required by Melissa is beyond the competence of a school nurse.

Detsel ex rel. Detsel, 637 F. Supp. at 1026-27.

We find the reasoning of these decisions persuasive, especially *Wright*. As therein explained, it is the "private duty" component of Samantha's care that is inherently burdensome. In *Katherine D.*, the child required suctioning of her tracheostomy two or three times a day and there was no hint that the child faced life threatening consequences in the event the routine care was not administered promptly. Similarly, the child in *Tatro* required catheterization every three or four hours and the Court did not suggest that the child might die if the school nurse was fifteen minutes late. Unlike this case, neither *Tatro* nor *Katherine D.* involved care of a constant nature or of life-threatening consequences to the student. The district court found that Samantha required almost exclusive medical supervision and that such care was necessary in order to protect Samantha's life. Requiring a school to hire a licensed practical nurse to care for one child is "inherently burdensome" and, undoubtedly, distinguishable from *Tatro*.

Samantha and her parents argue, however, that the district court was clearly erroneous when it concluded that Samantha required constant care and supervision. Samantha's father submitted an affidavit which indicated that, during the previous school year, he and his wife did not actually remain in the classroom with Samantha but waited in an adjacent room with a pager in the event Samantha required medical attention. The district court rejected this contention noting that:

> [a]lthough Samantha's father avers, in his supplemental affidavit, that it was not the plaintiffs' intention to request exclusive care for Samantha, the evidence presented at the hearing preponderates against any conclusion otherwise. While it is true that a nurse might be able to attend briefly to others in Samantha's room, there is no dispute that Samantha requires constant attention and often one-to-one care. The plaintiffs repeatedly point out in their briefs that Samantha's life-threatening condition requires that Samantha be the attendant's number one priority, and there is no evidence to the contrary.

We believe that the evidence adduced at the administrative hearing was more than sufficient to support the district court's finding. Samantha's father testified that Samantha's breathing tube could be easily dislodged if she coughed, changed her clothing, or even played roughly with other children. He stated that, if the tube was not reinserted within fifteen or twenty minutes, Samantha's carbon dioxide level would rise and she would fall asleep. Once asleep, Samantha would cease breathing and die if respiratory functions were not restored within four or five minutes. Neely also explained that when Samantha had a cold she required suctioning approximately every twenty minutes. When asked how someone could tell when Samantha needed suctioning, he responded as follows:

> I suppose basically you could say you just listen. The sounds that we are listening for is not the same one that you might be. It's just something that you learn

> or are taught to listen for. Also, I mean, we can tell by her lip color, by her fingernails, just by the way she is acting.

As the district court properly noted, if a nurse attended to the needs of other children, there would be no one present to observe Samantha's behavior, lip and skin color or any of the other tell-tale signs that Samantha required immediate suctioning.

Since the district court did not give its finding of constant care sufficient weight in its determination that the requested care could be provided without undue burden on the school district, we conclude that it was in error. The care requested by Samantha falls within the "medical services" exclusion to the IDEA. Accordingly, we **REVERSE** the decision of the district court and **AFFIRM** the ALJ's holding for defendant.

'93 NOV 5 PM 10

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SAMANTHA NEELY, By and Through Her Parents, GEORGE and CAROL NEELY

Plaintiffs,

v.

RUTHERFORD COUNTY SCHOOLS,

Defendants.

MEMORANDUM

The question before the court is whether the Rutherford County School District must, under the Individuals with Disabilities Education Act ("IDEA" or "the Act"), 20 U.S.C. Section 11400-1461, provide nursing care for Samantha Neely while she attends school.[1] Following a hearing at which all parties were represented by counsel, an administrative law judge with the Tennessee Department of education declared that such nursing care would not be services related to special education as defined under IDEA, and as such the school district is not required to pay for these services. IDEA provides that final orders of a state educational administrative body may be appealed to federal district court, which Ms. Neely's parents have now done. See 20 U.S.C.A. Section 1415(e) (West 1990 & Supp. 1994). The standard of review is de novo, but the district court is not to substitute its judgment of a proper education for that of the state.

See Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 205-07 (1982). The district court is to review the evidence presented at the administrative hearing, as well as any other evidence the parties submit, and make any findings of fact necessary to its decision based on a preponderance of the evidence. See 20 U.S.C.A. Section 1415(e)(2) (West 1990).

The full administrative record has been supplied to the court. The plaintiffs have supplemented this record by attaching the affidavit of Mr. George Neely to their brief in support of reversal. The defendant has filed an answer to plaintiffs' complaint but has submitted no supplemental evidence. The plaintiffs moved for expedited review of the case, which the defendant did oppose. A hearing was held April 4, 1994, at which the parties were given the opportunity to present arguments and additional proof, but no additional proof was offered. After considering the transcript of the administrative hearing and the exhibits thereto, the pleadings filed below, as well as the pleadings and affidavit filed here, the court makes the following findings of fact based on a preponderance of the evidence and conclusions of law.

I

Samantha Neely is a seven-year old child who has Congenital Central Hypoventilation Syndrome, an extremely rare condition that causes trouble breathing. Persons afflicted by this disease often undergo a tracheostomy procedure to aid in their breathing. Samantha underwent such a procedure, in which an opening is made in the throat, known as a stoma, through which a breathing tube is inserted. This tube

must remain in place at all times, else Samantha's breathing will stop or become shallow, she will lose consciousness, and she will die if full breathing is not quickly restored.[2] The breathing tube can be come dislodged relative easily (e.g. due to coughing or the adjustment of clothing).

As a result of the tracheostomy, Samantha cannot normally expel throat, mouth, and nose secretions. Accordingly, her breathing passages must be regularly suctioned by mechanical device to ensure that the secretions do not create a blockage; such a blockage would lead to death if not quickly cleared. The number of times Samantha must be suctioned each day varies with the season and with Samantha's health. For instance, when Samantha has a cold, she must be suctioned approximately every twenty minutes; when Samantha is in good health, she may need to be suctioned only after meals.

If Samantha's breathing stops (e.g., because of breathing tube has become dislodged or blocked), she may require ventilation via an AMBU bag, which is a device that artificially pumps air into the lungs. If resuscitation and appropriate other care is not promptly administered--within a very few minutes--serious brain damage or death will occur.

Samantha is unable to provide her own tracheostomy care. A well-trained, poised individual is required to provide the necessary services. Insertion of the breathing tube can be difficult, the suctioning process must be carefully performed to avoid injury to Samantha, and there is little margin for error when resuscitation methods are required. In emergency situations, as can easily arise, the care provider must be sufficiently well-trained to avoid panic given the short

response time necessary. Because of the life-threatening nature of Samantha's condition, she requires constant monitoring. Samantha's attendant must devote considerable amounts of his or her attention to Samantha and must never be very far away from Samantha. In a classroom setting, an attendant could conceivably provide services in addition to those provided to Samantha, but the attendant's primary task would be the care of Samantha.

Last year, Samantha's parents alternately attended school with Samantha to provide the care she needs. Due to the illness of another child, however, the Neelys were unable to provide these services again this school year. Accordingly, the Neelys petitioned the school district, and then the Tennessee Department of Education , to hire a full-time nurse or respiratory care professional to attend to Samantha during the school day. The school district initially agreed to make every effort to employ such an individual, revising Samantha's individualized educational plan (the "IEP) accordingly, but afte some amount of searching,[3] the school district hired an individual with only a nursing assistance's license to provide the care.[4] The school district was also prepared to train its teachers to aid in the care of Samantha. The Neelys objected to this care as inadequate to safeguard Samantha's health and removed Samantha from school when the care requested was not promptly provided. After a meeting with school officials[5] to determine why an RN, LPN, or respiratory care professional had not been hired, the parents agreed to home instruction for Samantha until the Education Department had determined whether the school district must hire a full-time nurse to care for Samantha. After the law judge ruled that the school district did not have

to pay for such care, the Neelys filed suit in this court on December 30, 1993. There is no contention that the state and school district failed to comply with the procedural requirements of IDEA; the only contention is that the school district has failed to comply substantively by not providing full-time nursing care.

II

Two preliminary questions must be answered to insure that the primary legal question--that of whether the school district is obligated to hire a nurse to care for Samantha--is properly before the court. First, is Samantha disabled as defined under IDEA? See 20 U.S.C.A. Section 1401(a)(1)(A) (West Supp. 1994). There is no dispute that Samantha is disabled for purposes of the Act. See Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 620 (6th Cir. 1990) (noting that the Act adopted a "'zero reject' principle which brings within its protective ambit a wide range of handicapped children who require special education and related service"). The school district has classified Samantha as disabled and does not argue differently here.

Second, who may provide the care needed under state law? Must it be a licensed nurse or respiratory care specialist, as the parents contend? Under Tennessee law, only a licensed practical or registered nurse, a respiratory care specialist needed by Samantha. See Tenn. Code Ann. Sections 63-6-402, -410. A physician is not legally required to provide the care. Therefore, Samantha is covered by the Act, and if she is going to receive care at school from someone other than a parent, that person must be an appropriately licensed professional. This brings us to the primary legal

question of whether IDEA requires the school to pay the salary of this professional.

A. Applicable Legal Standards

Section 1412 of IDEA dictates that states receiving federal education dollars must have in place "a policy that assures all children with disabilities the right to a free, appropriate public education." 20 U.S.C.A. Section 1412(1) (West Supp. 1994). "The term 'free appropriate public education' means special education and related services....." Id. Section 1401(a)(18) (West 1990). "The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and instruction in physical education." Id. Section 1401(a)(16) (West Supp. 1994). Finally,

> [t]he term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

Id. Section 1401(a)(17) (West Supp. 1994).

The question here is whether the care requested by Samantha's parents is a "related service" as defined above. If it is, then the school district must provide the service. If it is not, then the parents will have to provide the service or accept an alternative schooling arrangement. The answer to this larger question requires answers to two sub-questions: First, is the care Samantha needs a "supportive service[]...required to assist a child with a disability to benefit from special education"? If so, does this care fall under the "medical services" exclusion within the supportive services definition?

The Supreme Court has provided guidance on both questions. In Irving Indep. Sch. Dist. v. Tatro, 468, U.S. 883 (1984), the Court first considered whether catheterization services needed by a child suffering from spina bifida were "supportive services" within the purview of the Act.[6] After noting that transportation services and access requirements are specifically required by the Act, the Court concluded that "[s]ervices like [this catheterization service] that permit a child to remain at school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the school." Id. at 891. Accordingly, the catheterization service was deemed a supportive service. Id.

The Court next considered whether this service fell within the "medical services" exclusion to supportive services. Relying on the federal Department of Education's regulations providing more particularized definitions of the relevant terms, the Court concluded that excludable "medical services" are only those services that must be provided by a physician.[7] Id. at

892 & n.10; see 34 C.F.R. Section 300.16(b)(4) (1993) (defining "medical services"). Services provided by school nurses or other qualified personnel are "school health services" that must be provided as supportive services. Id. Because a physician did not have to provide the care required by the child in Tatro, the Supreme Court held that this care was not an excludable "medical service." The Court, however, also supported its decision with a discussion of (1) the nature of the requested service and (2) the burden which it would place on the school district. With regard to the nature of the services, the Court explained that it was unable to distinguish between the services sought by the handicapped student and those routinely provided by the school nurse to nonhandicapped students. It pointed out that even a trained lay person could have provided the services requested. With regard to the burden, the Court began by recognizing that the genesis of the medical services exclusion was partly based on Congress' intent to "spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence." It noted that the "services provided by a physician or hospital," which are excluded are "far more expensive" than the services of a school nurse. Clovis Unified Sch. Dist. v. California Office of Admin. Hearings, 903 F.2d 635, 642 (9th Cir. 1990) citations omitted).

Largely because of the qualifications added by the Court, few lower courts have interpreted Tatro to institute a bright-line, physician-based definition of the medical services exclusion. See id. (rejecting the bright-line rule); granite Sch. Dist. v. Shannon M., 787 F. Supp. 1020, 1026 (D. Utah 1992) (same); Bevin H. v. Wright, 666 F. Supp. 1022, 1027 (N.D.N.Y. 1986)

(same), aff'd, 820 F.2d 587 (2d Cir.), cert. denied, 484 U.S. 981 (1987); see also Dept of Educ. v. Katherine D., 727 F.2d 809, 815 (9th Cir. 1983) (pre-Tatro case using a burden-on-the-school-system test); Max M. v. Thompson, 592 F. Supp. 1437, 1444 (N.D. Ill. 1984) (pre-Tatro case considering but rejecting the bright-line rule). But see Macomb County Intermediate Sch. Dist. v. Joshua S., 715 F. Supp. 824, 828 (E.D. Mich. 1989) (adopting the bright-line rule). Instead, the courts have focused on the nature of the services requested, and on the concomitant costs to the school system, to determine whether these services fall within the medical services exclusion. The rationale for this approach is twofold. First, adoption of the bright-line rule would exclude certain services actually provided by a physician that could have been provided by an alternative caregiver. The fact that a doctor happens to provide certain services should not, in and of itself, insulate a school from paying for the services. See Clovis, 903 F.2d at 634; Max M., 537 F. Supp. at 14444. Second, endorsement of the bright-line rule could force schools to incur considerable medical costs for one child to the great detriment of the district and its other children. See Shannon M., 787 F. Supp. at 1026 ("The court does not read Tatro to stand for the proposition that all health services performed by someone other than a licensed physician are related services under the Act regardless of the amount of care, expense, or burden on the school system and, ultimately, on other school children.").

The reasons for rejecting the bright-line rule are persuasive. The reason for utilizing the bright-line rule, on the other hand, is uncovincing. Nondiagnostic medical services are excluded from the Act because they then to "be unduly expensive and beyond the range of

[the schools] competence" to provide, Tatro, 468 U.S. at 892; the physician-based test is presented as a good way for judging the cost and burden of providing certain services (i.e., as a good surrogate test). Yet, as noted above, this will not always be the case. A must better test is the direct test. By examining directly the burden imposed on a school, one avoid the perverse effects of excluding inexpensive medical services that happen to be provided by a physician and including enormously expensive services that are clearly medical in nature.

Additionally, it is not apparent that Congress or the Supreme Court meant for the title of the caregiver to be the sole determining factor in medical exclusion cases. There is no direct guidance from Congress within the Act as to what services fall within the medical services exclusion. Accordingly, the Department of Education supplied a definition. Although the Supreme Court accepted the agency's physician-based definition of the exclusion as a reasonable one in the Tatro case, the Court made a point of indicating how non-burdensome the care required there would be and of limiting its holding to assuage school district's fears of costs run rampant. See Tatro, 468 U.S. at 894-95; see also Clovis, 903 F.2d at 644 ("[T]he Court held only that services which must be provided by a licensed physician, other than those which are diagnostic or evaluative, are excluded and that school nursing services of a simple nature are not excluded.")

B. Application to the Present Facts

Most of the discussion above centered around the medical services exclusion. The initial question, however, is whether the nursing care requested is a

supportive service within the purview of the Act. Under the IEP at issue, which involves Samantha's daily attendance at school, there can be no question that the services requested by the plaintiffs are "supportive services required to assist a disabled child to benefit from special education." Absent the nursing care, Samantha could not attend school and thus would not receive the special education designed for her benefit in her IEP. When one considers an alternative IEP that involves home instruction, then of course this conclusion no longer follows. But under the IEP as agreed to by the parents and school, full-time nursing care is a services required to allow Samantha to achieve educational benefits.

The question arises whether a supportive service may be deemed "required" if under one IEP it is essential but under another, reasonable IEP it is not. Because a court is "not free to substitute [its] notion of sound educational policy for those of the local school," Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 627 (6th Cir. 1990); see Board of Educ. v. Rowley, 458 U.S. 176, 204-10 (1982), a court may only consider those IEPs formulated by the parties and presented to the court. Therefore, for purposes of determining whether a service is a supportive service, a court my only consider that service in the context of a properly submitted IEP.

Having found the requested service to be a "supportive service" within the purview of the Act, the court must next decide whether this services falls within the medical services exclusion. This question would be easily answered (in the negative[8]) if the court were to employ the physician-based test of the exclusion, for the most obvious benefit of this test is its ease of application. However, the court will examine the nature

and costs of the requested service to decide whether it is excluded, and this test is somewhat more difficult to apply.

The requested care must be provided by a licensed nurse or respiratory care specialist. It is full-time in nature, requiring that the nurse or attendant devote his or her constant attention to Samantha. Although Samantha's father avers, in his supplemental affidavit, that it was not the plaintiff's intention to request exclusive care for Samantha, the evidence presented at the hearing preponderates against any conclusion otherwise. While it is true that a nurse might be able to attend briefly to others in Samantha's room, there is no dispute that Samantha requires constant attention and often one-to-one care. The plaintiffs repeatedly point out in their briefs that Samantha's life-threatening condition requires that Samantha be the attendant's number one priority, and there is no evidence to the contrary.

As to the cost of this care, the evidence indicated that a properly qualified individual could be retained at an hourly rate of $9. This rate is approximately two dollars higher than the rate at which the nursing assistant originally hired by the school was to be employed. The school district currently employs at least two other certified nurse's assistants who are paid between $6.75 and $7 per hour. If we assume a forty hour work week for 9.5 months, the 47 per hour rate translates into base salary of $10,640 and the $9 per hour rate translates into a base salary of 413,680. cf. Shannon M., 787 F. Supp. at 1029 (excluded tracheostomy care estimated to cost $30,000 annually).

Although the care requested is clearly medical in nature, the costs of this care would not be so

burdensome that the service should fall within the medical exclusion. The school district currently employs personnel who perform task similar to that Samantha's nurse would perform; the costs of that care and of the requested care are comparable.[9] Moreover, an alternative schooling arrangement, presumably home schooling, would not be cost-free to the school district. Most importantly, the requested service will allow Samantha to benefit from a plan of special education that all parties agree she seriously needs, in a mainstream environment. See Thomas, 918 F.2d at 627 (federal law established a preference for "mainstreaming" of disabled children). The gains to the child, relative to the burden imposed on the school district, are weightier. Absent evidence that the care requested would be unduly burdensome to the school district, the nursing care will be deemed a related, supportive service that falls outside the medical services exclusion.

III

For the reasons stated above, the defendant will be directed to provide the care requested by the plaintiffs in an accompanying Order.

1. IDEA was previously titled the Education of the Handicapped Act.

2. When Samantha is sleeping, she must be attached to a mechanical ventilator because she cannot breathe on her own at all when unconscious.

3. The Neely's characterize the school district's efforts as insufficient; the school district characterizes these efforts as sufficient. The proper characterization is immaterial to the question before the Court.

4. This nurse's assistant was to be paid between $6.75 and $7 an hour. The school district currently employs at least two other persons at this rate who perform similar duties (i.e., care for medically fragile children). A licensed practical nurse, who was then employed by a home health care service at an hourly rate of $9.09, attempted to apply for the position but was told a nurse would likely not be hired for the position.

5. This meeting involved the parents and members of the multi-disciplinary team, or M-team, assigned to Samantha's case.

6. Although the Court considered the act several years ago, when it was still the Education of the Handicapped Act, none of the relevant provisions have changed substantively.

7. The relevant regulation defines only those medical services that must be paid by a state: "'Medical services' means services provided by a licensed physician

to determine a child's medically related disability that results in the child's needs for special education and related services." 34 C.F.R. Section 300.16(b)(4) (1993). It does not explicitly define excludable medical services, but the logical definition was drawn by the Supreme Court: "Presumably this means that 'medical services' not owed under the statute are those services by a licensed physician' that serve other purposes." Tatro, 468 U.S. at 892 n.10.

8. The services need not be provided by a physician, nor have they been requested to be, and so they would not fall under the medical services exclusion under the bright-line test.

9. Although the care requested is very similar to that excluded by the courts in Detsel, 637 F. Supp. at 1026-27 (constant, in-school nursing care for a child with a tracheostomy), and Bevin H. 666 F. Supp. at 73, 75 (constant care for a multiply-handicapped child who has a tracheostomy), it is hard to justify labelling the care requested here as "too burdensome" when the school district already provides similar, though somewhat less costly, care to other children in the district.

TENNESSEE DEPARTMENT OF EDUCATION

N

vs. No. 93-33

RUTHERFORD COUNTY
SCHOOL SYSTEM

FINAL ORDER

In this cause, an open due process hearing was requested and originally scheduled for September 28, 1993 at the offices of the Rutherford County Department of Education. At this time the Petitioners did not have counsel and when counsel was employed by the Petitioners, by agreed order said cause was rescheduled for October 28, 1993, wherein the open due process hearing was held. All parties were represented by counsel.

THE ISSUE

Whether the Rutherford County Board of Education is required to have a Licensed Practical Nurse, a Registered Nurse or a Respiratory Therapist to provide classroom nursing care to student N during school for the case and maintenance of her tracheostomy tube.

FINDINGS OF FACT

Student N is a seven year old child with an extremely rare condition known as Congenital Central Hypoventilation Syndrome. Individuals with this disorder have a shallow breathing which does not allow air to the entire lungs, resulting in hypoxemia (low oxygen in the blood), hypercapnia (high carbon dioxide in the blood) and acidosis (acidity in the blood). In this particular case, student N does not breathe at all when she is sleeping and would not breathe if she were unconscious, for some other reason. N breathes through a hole in her throat known as a stoma. The stoma was created by a medical procedure known as tracheostomy. The stoma does not stay open by itself and the tracheostomy tube must be inserted. This is held in place by a tracheostomy tube holder, which she wears around her neck. The tube consists of two parts, an outer cannula and an inner cannula. The outer cannula always remains in place and different inner cannulas are used at different times, one for sleeping and one for awake. The inner canula can be removed and exchanged without removing the outer cannula. N is unable to remove nose, mouth and throat secretions normally and must be removed by suctioning. A mechanical suctioning devise is inserted through the stoma to remove these secretions, the frequency depending upon the volume of materials and her daily activities.

N needs to be suctioned and observed closely to make sure that she does not lose consciousness. She needs someone who can reinsert her tracheostomy tube if it falls out. She also needs someone who can do what is necessary in an emergency situation, someone to ventilate her with a mechanical

device known as an ambu bag, if breathing stops or she loses consciousness. There is no margin for error and unless breathing is restored, N will die.

N was evaluated by the Comprehensive Development Center at Vanderbilt. The report recommended that a Licensed Practical Nurse or a Registered Nurse be trained in caring for her unique medical needs... Bi-monthly rechecks on their ability to manage the equipment and procedures.

States receiving funds under the Individuals with Disability Education Act [IDEA] are obligated to satisfy certain conditions. A primary condition is that the State implement a policy that assures all handicapped children the right to a free, appropriate public education. 20 U.S.C. Section 1412[1]. A "free, appropriate, public education" is defined as "special education and related services." Section 1401[a][18] The term "special education" means:

> "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction and instruction in hospitals and institutions."

Section 1501[a][16]

"Related services" are defined as:

> "Transportation and such developmental, corrective, and other supportive services

(including speech pathology and audiology, psychological services, physical and occupational therapy, recreation and medical counseling services, except that such medical services shall be for diagnostic and evaluation purposes only as may be required to assist the handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children."

Section 1401[a][7]

The issue in this case is whether the Rutherford County Board of Education is required by IDEA to provide a Licensed Practical Nurse, Registered Nurse or a Respiratory Therapist to provide classroom attention to N as "related services" or whether a requirement would be a "medical service", which the school system is not required to provide.

One of the first cases to address the distinction between "related services" and "medical services", which the school is not required to provide, was Irving Independent School District v. Tatro 468 U.S.883, 104 S.Ct. 3371, 82 L.Ed. 2d 664 (1984). In this case, the child had a bladder disorder which prevented her from emptying her bladder voluntarily and required clean intermittent catheterization (CIC) every three or four hours. CIC is a procedure involving the insertion of a catheter into the urethra to drain the bladder. The court noted that CIC is a simple procedure which can be performed in minutes by a layperson with

very little training. The court found that the CIC service was a supportive service "required to assist a handicapped child to benefit from special education." The court further found that CIC services was not excluded by the medical service provision of the Act. The court specifically found that CIC services were not materially different from services provided to non-handicapped children by laypersons. The Supreme Court has given no further guidance.

In the post-Tatro case, Detsel v. Board of Education of Auburn, 637 F.Supp. 1022 [N.D.N.Y. 1986], aff'd 820 F.2d 587 (2d Cir.), cert. denied, 484 U.S. 981, 108 S.Ct. 495, 98 L.Ed. 2d 494 (1987), found that nursing care could constitute a medical service which the school system is not required to provide. The court further held that if the "related services" mandated and resembled the "medical services" even though it could be provided by a Practical Nurse rather than a physician, it was not necessary under the Act. The court Detsel stated:

> "In the case at bar, the services in questions do not fall squarely within the terms of the 'medical services' exclusion because they need not be performed by a physician, nor do they qualify as simple school nursing services. The extensive, therapeutic health services sought by the plaintiff on behalf of her daughter more closely resemble the medical services specifically excluded by Section 1401 (17) of the EAHCA. Even though they do not fulfill the 'physician' requirements set forth in 34 C.F.R. 300.13(b)(4), the

exclusion of the disputed services is in keeping with its spirit."

Accordingly, the court held that the school system was not required to provided the classroom nursing care the parents were seeking.

This was followed by other cases including Bevin H. v. Wright, 666 F.Supp. 71 [W.D. Pa. 1987], a case similar to this case. This child's gastrostomy tube required cleaning and suctioning as N and the child faced the danger which N faces. The court noted:

> "The nurse would remain with Bevin at all times because of the constant possibility of a mucous plug in the tracheostomy tube. Such a plug is a common event, occurring several times each day, and must be cleared by the nurse within thirty seconds to prevent injury to Bevin."

The court held that even though these services did not require a physician, they were in essence medical services, and held further that the school was not required to hire a nurse to provide tracheostomy care to the child as such care was a medical services excluded by the IDEA.

In this case, it appears that the demands of the Petitioners required medical services, which is different from Tatro. The issue is whether the hiring of a Licensed Practical Nurse, a Registered Nurse or a Respiratory Therapist for N in the classroom is a medical service, which the system is not required to

provide under IDEA. State law provides under T.C.A. 63-6-401 and 63-6-415 that individuals with medical licenses are required for the maintenance of a tracheostomy tube. The State law limits the performance of tracheostomy tube care to a medically licensed professional.

The court further finds that N's health condition indicates she needs close monitoring. The parents in their brief stated:

> "For N to attend school, she needs to be suctioned. She also needs to be closely observed to make sure that she doesn't lose consciousness. She needs someone who can reinsert her tracheostomy tube if it falls out. Finally, she needs someone who can do what is necessary in an emergency situation. If N lost consciousness and stopped breathing, the individual responsible will need to ventilate N with a mechanical device known as an ambu bag. If N stops breathing there is no margin for error. Unless breathing is restored almost immediately, N will die.

CONCLUSION

The court is of the opinion that the Petitioners are asking for relief which they are not entitled to under the law, and which the school system is not required to provide.

The court, therefore, finds that the

request of the Petitioners for a Licensed Practical Nurse, a Registered Nurse or a Respiratory Therapist to provide classroom nursing care for N for care and maintenance of the tracheostomy tube, is not required and is a medical service. The Rutherford County Board of Education is not required to supply these services.

This decision is binding upon all parties unless appealed.

Any party aggrieved by these findings and decision may appeal to the Chancery Court of Davidson County, State of Tennessee, or may seek review in the United States District court for the Middle District of Tennessee. Such an appeal must be taken with sixty (6) days of the entry of the final order and non-reimbursement cases within three (3) years in cases involving reimbursement of educational costs and expenses. In appropriate cases, the reviewing court may direct this final order be stayed, pending further review of the cause.

Entered this 30th day of November, 1993.